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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 136

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court, printed in the Joint Appendix at pp. 412a–438a, is reported at 154 F. Supp. 770. The opinion of the Court of Appeals (Pet. App. 1–9) is reported at 264 F. 2d 112.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1959 (Pet. App. 10). A timely petition for rehearing was denied on April 2, 1959 (Pet. App. 13). The petition for a writ of certiorari was filed June 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on condemnation, the United States must pay the enhanced value of property resulting from improvements made by a lessee who was under contract with the United States to lease property, improve it and manufacture munitions, the United States reimbursing the lessee in full for its expenses in making the improvements.

STATEMENT

The United States instituted this condemnation proceeding in August, 1954, to acquire 15.3 acres of land and improvements owned by the Delaware, Lackawanna and Western Railroad Company in Scranton, Pennsylvania (J.A. 4a). The property was part of the petitioner's terminal facilities and had been used for the repair of steam locomotives. Since conversion to Diesel engines, the area and structures were surplus to the Company (J.A. 401a, 416a).

In January, 1953, about 19 months prior to this proceeding, the property was leased by United States Hoffman Machinery Corporation for use as a plant to manufacture large calibre artillery shells for the Korean War (J.A. 318a, 330a). Under Hoffman's contracts with the Government it was to find a suitable location, lease it, make the necessary alterations and installations and produce the shells. The United States had to approve the site and the terms of the lease, reimburse Hoffman item-by-item for all expenses incurred in adapting the property to that use and then pay a sum which would cover the lease rental, cost of materials and a profit to Hoffman

(J.A. 193a, 198a, 338a, 342a, 403a). The lease was for an initial term of 15 months at $500,000 with the right to renew for four additional years at an annual rental of $400,000 (J.A. 324a–325a). As the lease terms discussed in some detail *infra* show, the petitioner was advised of the Government's interest in the transaction. At the same time, and as a condition to approval of the lease by the Government, the petitioner granted to the Government an option to purchase the property after one year for the sum of $2,000,000 (J.A. 341a–349a).

Hoffman entered upon the premises and made extensive and costly alterations (new roofs, floors, walls, black top, etc.) for which it was reimbursed by the Government (J.A. 385a, 403a, 417a). After the initial term, the lease was renewed for a year pursuant to its provisions. Within that period the Government filed this proceeding to condemn the fee and a declaration of taking with a deposit of $860,000 as estimated just compensation (J.A. 4a–13a).

At the trial on valuation before three commissioners, the Government contended that the property must be valued as of the date of the filing of the declaration of taking, but in the physical condition that existed before the alterations and improvements. The ground given was that, under numerous decisions, the Government may not be required in a condemnation action to pay again for improvements which it has made and which the landowner never owned. The commissioners overruled this contention (J.A. 404a–405a).

Accordingly, valuations were made on behalf of the petitioner ranging from $2,000,000 to $4,000,000 (J.A.

387a–392a). The Government set the value at $1,000,000 (J.A. 394a). A witness for the petitioner who valued the property at $2,250,000 testified that the improvements had enhanced the property by about $250,000 (J.A. 159a–160a, 373a). The Government's valuation included $300,000 for such enhancement (J.A. 263a, 373a, 394a). The commissioners awarded $1,720,000 (J.A. 404a) and the district court, rejecting the Government's contention, affirmed the award (J.A. 412a–438a).

On appeal by the Government, the court below found error in allowing compensation for the improvements and reversed (Pet. App. 6–11). It reached that result on two independent grounds: (1) the terms of the lease were express in retaining ownership of the improvements in the Government and (2) it is settled law, in the absence of lease terms to the contrary, that a condemnor does not pay the value of improvements which it had added to the property.

ARGUMENT

The petitioner urges that it should be paid for the improvements because their value was "expressly contracted for as part of the consideration for leasing petitioner's property" (Pet. 6) and because they were fixtures incorporated into the realty (Pet. 8). Those contentions are contradicted both by the terms of the lease and by established law.

1. The lease provides that the lessee "may: (1) remodel and renovate the demised premises" (Art. 8th; J.A. 328a); and it "will keep and maintain the demised premises in good order and condition, and

will make all necessary repairs thereto, including necessary painting thereof, in a good and workmanlike manner" (Art. 19th; J.A. 336a); that "Title to property furnished Lessee by the United States government shall not be affected by the incorporation or attachment thereof in or to the demised premises, nor shall such property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to the demised premises" (Art. 26th; J.A. 338a); that "upon termination" lessee shall "surrender the same to Lessor in good order, condition and repair (reasonable wear and tear excepted), removing * * * all other property (including property furnished by the United States * * *) placed, installed or constructed upon or affixed to the demised premises by Lessee" and that "if the removal of any such property [furnished by the United States] shall cause structural damage * * *, Lessee will repair the same so as to put the premises into either substantially the condition existing prior to the installation of such removed property, reasonable wear and tear excepted, or in equally good serviceable condition * * *" (Art. 29th; J.A. 339a–340a).

Thus, as the court of appeals held (Pet. App. 7), the petitioner was entitled to receive back at the term's end no more than what it delivered at the beginning. Materials incorporated in or attached to the property were not part of the consideration paid for the lease[1] and did not become part of the realty.

[1] The annual rental paid to the petitioner ($400,000) was 20% of the price the petitioner put on the fee ($2,000,000) in granting the option to purchase at the time of the lease. This

At the time of the filing of the declaration of taking in these proceedings, title to none of the improvements had passed to the petitioner. The situation is the same as that in *Old Dominion Co. v. United States*, 269 U.S. 55, where the Government had entered upon land under lease and erected warehouses with the right to remove them within 30 days after termination of the lease. Within that 30-day period the Government instituted a condemnation proceeding. The statute authorizing condemnation required exclusion from just compensation of any allowance for improvements made by the Government. In refusing such compensation, this Court said (p. 65):

> * * * But upon this issue the statute was superfluous. When these proceedings were begun the buildings belonged to the United States.

Articles 8th and 9th of the lease (J.A. 328a–330a), on which the petitioner relies as covenants by the lessee to remodel and renovate the property for the advantage of the lessor (Pet. 7–8), are in fact the provisions permitting the lessee to make necessary changes to adapt the property to fulfill the purpose of leasing it, namely the manufacture of munitions. On the other hand, the provisions of Article 19th (J.A. 336a) and 29th (J.A 339a–340a) dealing with repairs and the return of the property at the conclusion of the lease are nothing more than the usual lease provisions for maintenance of leased property in the condition in which it was received, reasonable wear and tear excepted. The petitioner's claim that

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fact is hardly compatible with the notion that additional consideration for the lease was contemplated.

these provisions give it any rights to enhanced value is groundless.

2. As the court below held (Pet. App. 8–9), the same result would be reached under settled law even if the terms of the lease were not express. The "overwhelming case law" (34 A.L.R. 1083; L.R.A. 1916F 980) is that improvements made during a prior occupancy of land by the Government or a corporation possessing the power of eminent domain do not become part of the land in the sense that their value is to be considered in determining the compensation to be awarded the landowner in a subsequent condemnation proceeding. The principle rests on the doctrine of unjust enrichment and, additionally, where the Government is concerned, upon the view that compensation must be "just, not merely to the individual whose property is taken, but to the public which is to pay" it, and that "The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual * * *." *Searl* v. *School District, Lake County*, 133 U.S. 553, 562. To pay the landowner for an enhancement solely created by expenditures from the Treasury enriches him to the corresponding detriment of the taxpayer.

In *Norfolk & O. V. Ry Co.* v. *Consolidated Turnpike Co.*, 111 Va. 131, affirmed under reversed title, 228 U.S. 596, the Virginia court quoted from II Lewis, *Eminent Domain* (2d ed.), Sec. 507 (also cited in this Court's affirming opinion as Sec. 759 (3d ed.)), as follows:

> Indemnity, in the case supposed, does not include the value of the works prematurely placed upon the property. The owner has not lost the value of such works; but, if their value is given to him, it is so much in excess of his loss; which is something never contemplated by the constitution.

In *Bibb County, Georgia* v. *United States*, 249 F. 2d 228, 230 (C.A. 5), where the Government had not removed its improvements prior to termination of the lease, the court said that "it would be a clear perversion of justice to permit the invocation of the dry as dust legal principles as to fixtures" "to require a gift of the value of the improvements to the landowner. See also *Anderson-Tully Co.* v. *United States*, 189 F. 2d 192, 196 (C.A. 5), certiorari denied, 342 U.S. 826; *Bear Gulch Placer Mining Co.* v. *Walsh*, 198 Fed. 351, 355 (D. Mont.); *United States* v. *Smith*, 110 Fed. 338, 340 (E.D.N.Y.). The general public has an interest in the improvements and the structures are not dedicated to the use of the freehold but to a public use.

The decisions relied upon by the petitioner (Pet. 6, 10) do not support its contentions. *United States* v. *Five Parcels of Land in Harris County, Texas*, 180 F. 2d 75 (C.A. 5), certiorari denied, 340 U.S. 812, did not deal with structural improvements on the property. The court said (p. 75): "No one questions the right of the United States to remove structural improvements and facilities, and no attempt is made to obtain payment for such improvements or facilities."[2] The case dealt

[2] The decision further accords with the present case in treating improvements made by a contractor as having been made, in effect, by the United States.

with enhanced value as a result of "dredging, filling, and leveling" of the land to create a channel and shipyard (pp. 77–78). There was extensive testimony that the low rental could not be justified except that such improvement to the property was intended to be one of the "fruits of the leases other than annual rentals" (p. 76). Thus, the *Five Parcels* case differs materially on the facts from the present case and does not constitute a conflict among circuits because it is not the rule in the Fifth Circuit as to structural improvements or improvements on the land which are involved here.

Moreover, we agree with the court below that the opinion is erroneous in announcing a distinction between improvements on and to the land, without a clear agreement in the lease to that effect, because the reasons behind the rule leave no opening for such a distinction. The later unanimous decisions in the same circuit in *Anderson-Tully* and *Bibb County, supra,* indicate that it has adopted the general view of the dissenting judge in the *Five Parcels* case.

In *United States* v. *Certain Parcels of Land in Warren County,* 90 F. Supp. 27, 29 (W.D. Va.), cited by petitioner, the lease allowed the Government to alter the property and then provided: "All such alterations, additions, structures, fixtures, and improvements *except* walks, service driveways, underground utilities (and appurtenances), and roads, shall be and remain the property of the Government and may be removed by the Government prior to or within a reasonable time after the expiration of this Lease." (Emphasis added.) The court held (p. 33)

that the landowners thereby became vested with a fixed interest in the improvements which were listed in the above-quoted exception. There is no comparable provision in the lease in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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